SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 329

COMPAGNIE GENERALE TRANSATLANTIQUE,
Petitioner,

vs.

GEORGE V. TAWES.

BRIEF IN SUPPORT OF PETITION.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is to be found reported in 111 F. (2d) 92.

II.

Statement of Jurisdiction.

The statute on which the jurisdiction of this Court is predicated is Section 240 (a) of the Judicial Code as amended (U. S. C. Title 28, Section 347), in which it is provided that in any case, civil or criminal, in a circuit court of appeals, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto,

to require by certiorari, either before or after the judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

III.

Statement of the Case.

A full statement of the case has already been given under the heading A in the petition for writ of certiorari, and in the interest of brevity need not be repeated at this point.

IV.

Specification of Errors.

The Circuit Court of Appeals erred in the following particulars:

1.

In not holding that instruction number 3 of the trial court submitted to the jury the defense of inevitable accident, an affirmative defense which had to be alleged and proved, and not having been alleged and proved, it should not have been submitted to the jury.

2.

In not holding that instruction number 3 to the jury was inherently inconsistent and intended to confuse the jury, in that in one portion of the charge the trial court advised the jury that it was respondent's duty, when overtaken by foggy weather, immediately to take every precaution for safety and to anchor or moor the vessel at the first available place; whereas in another part of the charge the trial court told the jury that if the respondent was suddenly overtaken by fog obscuring visibility, he was then required only to use ordinary care and skill to prevent the grounding.

3.

In not holding that the rules governing the navigation of the Canal are clear and unambiguous, that they require the anchoring of a vessel at the first available place upon the approach of fog, that they cannot be interpreted to allow a pilot to navigate a vessel in a fog, using, as instruction number 3 of the trial court put it, only "ordinary care and skill".

4.

In not holding that there was no evidence in the record to justify the court's intimation in its instruction number 3 that the respondent, by the exercise of ordinary care and skill, could not have noticed his visibility being shut out by dense fog.

5.

In not holding that the trial court by its instruction number 3 to the jury seriously understated the pilot's duty by stating that he was not liable if, when confronted by fog, he then used "ordinary care and skill"; the pilot's duty under such circumstances being to proceed with unusual caution, utmost precaution, and extraordinary care.

6.

In not holding that by its instruction number 5 to the jury the lower court, even considering the charge as a whole, erroneously instructed the jury that it must be convinced beyond a reasonable doubt of petitioner's right to recover.

7.

In not holding the verdict to have been obviously contrary to the law as given by the trial court in its instruction number 1.

8.

In not holding that there was a total absence of substantial evidence on which the verdict could have been decided.

9.

In not holding that the verdict was contrary to the undisputed evidence.

10.

In not maintaining petitioner's four assignments of error and in not reversing the judgment of the lower court.

V.

ARGUMENT.

(a) Instruction Number 3 Was Confused, Inconsistent, and Untenable.

Instruction number 3 submitted to the jury a theory of the case based on the idea that the jury might exonerate the pilot if it believed that the accident was because of the fog, unavoidable by the use of ordinary care. The presumption of negligence arising out of the grounding of the vessel on the banks of the Canal in a well known and well marked channel requires strong exculpation. This charge to the effect that if the accident was unavoidable by the use of ordinary care submitted to the jury a defense of inevitable accident. Inevitable accident, however, is an affirmative defense which must be alleged and proved. See *The Merchant Prince, Prob. Div.* (1892) 179; *The Edmund Moran,* 180 Fed. 700 (2 C. C. A. 1910); *Bradley* v. *Sullivan,* 209 Fed. 833; *The Olympia,* 61 Fed. 120; *The Lackawanna,* 210 Fed. 262 (2 C. C. A. 1913); *Reichert Towing Line,* 251 Fed. 214; *Anna C. Minch,* 271 Fed. 192 (2 C. C. A. 1921); *The Drumcraig,* 133 Fed. 804 (N. D. Cal. 1904); *City of Camden,* 292 Fed. 93 (3 C. C. A. 1923); *The Manhattan,* 3 Fed. Sup. 75

(E. D. Pa. 1932); *Union SS Co.* v. *N. Y. & Va. SS Co.*, 16 L. Ed. 699, 65 U. S. (24 How.) 307 (1860); *Baltimore Steam Packet Co.* v. *The Flushing*, 18 L. Ed. 85, 70 U. S. (3 Wall.) 164 (1865). In this case there was no pleading of any affirmative defense; specifically there was no pleading of inevitable accident. Under these circumstances this charge placed upon the jury an issue wholly unrelated to the case.

The charge, however, was fatally inconsistent, in that in its first portion it instructed the jury that it was the duty of Tawes, when overtaken by foggy weather, immediately to take every precaution for safety, and to anchor or moor the vessel at the first available place. By the same charge, however, in the face of the unequivocal rule of the Canal requiring anchoring at the first available place, the court in effect advised the jury that the pilot could proceed so long as he used "ordinary care and skill". So, too, the charge is predicated on a fact situation not disclosed by any evidence in the record. It is based on some theory that Tawes could not have anticipated that he would be overtaken by fog. The Court will note that the record is all one way on this point and is to the effect that his visibility had been shut out on three prior occasions that same morning to the extent that he had to stop the ship each time. He knew that he was likely to run into fog in making the very turn on which he grounded (R. 65). In this situation the court should not under any circumstances have suggested to the jury that Tawes might not have anticipated his visibility being obscured. There was no justification for such a suggestion.

The final and most important point about this charge, however, is the court's statement that if, when confronted with the fog, Tawes then used "ordinary care and skill", he was not liable. This is not a correct statement of his duty. On the contrary, it was his duty to use the extraordinary care required by the extraordinary circumstances. With the knowledge that he had been running

through fog all morning and finding himself in the fog again at the turn into Mamei Curve, it was not sufficient that he use only "ordinary care and skill". Confronted with extraordinary circumstances he was required to take the extraordinary precautions called for by the situation in which he found himself. The rule is that a vessel in a dense fog is bound to observe "unusual caution", *The Belgian King,* 125 Fed. 869, at 876 (9 C. C. A. 1903, cert. den. 193 U. S. 669, 24 S. Ct. 852, 48 L. Ed. 840); is bound to navigate "with the degree of extraordinary care and precision which the peculiar conditions then existing made necessary", *The Amiral Cecille,* 134 Fed. 673, at 676 (W. D. Wash. 1905); that "in thus proceeding the utmost precautions" are necessary, *The City of Lowell,* 152 Fed. 593, at 594 (2 C. C. A. 1907). These precautions must be taken not only when the vessel is herself enveloped in fog, but also when she is approaching a bank or patches of fog, *The Julia Luckenbach,* 219 Fed. 600 (E. D. Va. 1914). For a full review of the American and English cases on the subject of the "extraordinary care" and "utmost precaution" required in a fog, see *The Umbria,* 166 U. S. 404, 17 S. Ct. 610, 41 L. Ed. 687.

When the trial court, in the case at bar, charged that Tawes, confronted with the fog, was required to use "ordinary care and skill" it seriously understated the duty imposed by law upon the pilot. The failure to charge that Tawes' duty was to use the "extraordinary care" and "utmost precaution" required by the extraordinary circumstances was prejudicial error.

(b) By Instruction Number 5 the Trial Court Charged the Jury That Petitioner Had the Burden of Proving Its Case Beyond a Reasonable Doubt.

That the plaintiff in a civil case is not required to prove its case beyond a reasonable doubt is a legal truism. *Aetna Life Insurance Company* v. *Coffee,* 286 Fed. 657 (5 C. C. A.);

Gage v. *Railroad Co.*, 14 S. W. 73 (Tenn.); *McBee* v. *Bowman*, 14 S. W. 481 (Tenn.). See, also, 10 R. C. L. 1012; 64 C. J. 710; *Bryan* v. *Chicago, etc., Ry. Co.*, 19 N. W. 295 (Iowa); *Heacock* v. *Baule*, 249 N. W. 437 (Iowa); *Hoffman* v. *Lond*, 69 N. E. 231 (Mich.); *Aarons* v. *Levy Bros.*, 185 N. E. 62 (Ohio); *Grotjan* v. *Rice*, 102 N. W. 551; *Randall's Instructions to Juries* (1922), Vol. II, Sec. 247, pp. 479, *et seq.* The charge in question clearly placed on the petitioner the burden of satisfying the jury beyond a reasonable doubt. The Circuit Court of Appeals admits that this instruction does not accurately state the burden which the plaintiff was required to bear (R. 97). The Circuit Court of Appeals, however, was of the opinion that taking the charge as a whole, it was not erroneous (R. 97). The damaging and inaccurate statement cannot be cured by the confused language of the trial court in the remainder of the charge.

(c) The Verdict Was Obviously Contrary to the Law as Given to the Jury by the Trial Court in Its Instruction Number 1.

Instruction Number 1 appears at pages 13, 14, and 15 of the record. According to this instruction, it was Tawes' duty, while the vessel was under way in the Canal and was overtaken by thick weather so dense as to obscure vision, immediately to direct and to take every precaution necessary for safety, and to *anchor or moor* the vessel at the first available place. The trial court amplified by adding that, if the jury believed that the vessel was overtaken by thick weather so that his version of navigating aids was obscured, and that he negligently failed to stop the vessel, or negligently failed to take all necessary precautions for the ship's safety, but negligently allowed the ship to proceed until he was advised that there was land ahead and it was then too late to steer the ship back into the channel and to avoid grounding her, and as a direct and proximate result

of such negligence, if any, the vessel went aground, then the law was for the plaintiff and the jury should so find.

The record will disclose that the vessel had been navigating in and out of the fog all morning (R. 35, 36, 43, 53, 64, 65, 67). On three different occasions Tawes had obeyed the navigation rules and had brought the vessel to a stop (R. 64, 65). There is no substantial, credible evidence explaining why the same procedure could not have been adopted when this fourth and final fog was encountered. Immediately prior to encountering the dense fog in which he grounded, he had been running through patches of fog (R. 65); he knew before he reached the turn that he was likely to encounter dense fog around it (R. 65). With this knowledge and with his experience of intermittent fog throughout the morning, his only precaution was to cut the vessel's speed from seven knots to six (R. 65) and to keep on his way. Disregarding the mandatory rule to anchor at the first available place, Tawes proceeded under way in the fog without any exact knowledge of where he was. The evidence on that point is uncontradicted (R. 74). The verdict rendered as it was in obvious disregard of instruction Number 1 should have been set aside.

(d) There Was a Total Absence of Substantial Evidence on Which the Verdict Could be Based.

The only evidence adduced on the trial on behalf of the pilot was that of Tawes himself. His testimony, appearing at pages 63 *et seq.* of the record, is absolutely devoid of any grounds of exculpation. The whole picture presented is one of confusion. Although he had been encountering fog off and on all morning, although he had been forced to stop on three occasions by fog, and although he had been navigating through patches of fog just prior to making the turn on which he grounded, he did not stop to get his bear-

ings before beginning to negotiate the turn (R. 74). The record may be scrutinized with the greatest of care without finding a single solitary reason why Tawes could not and did not bring the vessel to a stop to wait out the fog at this point as he had done on three prior occasions. In the total absence of substantial evidence to support it, the verdict should have been set aside, and the failure of the trial court to set it aside, and of the Circuit Court of Appeals to reverse, should be reviewed by this Court.

(e) Conclusion.

This Court has not at any time passed squarely upon the duties and liabilities of the pilot to his vessel. This we think is an extremely important question of maritime law which should be examined, passed upon, and settled by this Court. The law should not be left in the confused, contradictory, and inconsistent shape in which the charges of the trial court in the instant case have left it. Here we have a pilot grounding a vessel in well known and well marked waters; a pilot navigating in a fog without any exact knowledge of where he is; a pilot failing to obey the specific rules and regulations of the Panama Canal requiring his anchoring the vessel in foggy weather; a pilot failing to take the ordinary precautions of getting his bearings, although there was no reason why he could not do so, and although he had done so on at least three prior occasions; all in spite of the fact that he had brought the vessel to a stop on account of fog on no less than three prior occasions; in spite of the fact that fogs are admittedly common in that vicinity at that time of the year; and in spite of the most persuasive fact that the vessel had been encountering dense fog and patches of fog throughout this particular trip. In the face of this situation, wholly uncontradicted by any evidence in the record, a jury proceeded to

clear the pilot. It is submitted that the case is preeminently one for the exercise of this Court's supervisory jurisdiction in order that the duties and liabilities of the pilot to his vessel be passed upon by this Court.

Respectfully,

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